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CONSTITUTIONALITY OF EMPLOYERS' LIABILITY ACT WHICH IMPOSES LIABILITY FOR ACCIDENT WITHOUT FAULT OF EMPLOYER.

"I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea." With this candid confession of fear of one of the many radical departures from established principles so characteristic of the present day, Justice McKenna, speaking for three other members of the Supreme Court, voices his dissent to the decision in the case of Arizona Copper Co. v. Hammer, 39 Sup. Ct. Rep. 553.

Several years ago we called attention to a new principle gradually gaining recognition in the common law—the principle that *society* was responsible for injuries to those engaged in hazardous occupations—apart from and irrespective of any element of negligence on the part of the employer or assumption of risk on the part of the employee. This principle is, as we have said before, diametrically opposed to the individualistic conception of liability recognized by the common law and is based on a theory of collectivism now the dominant theory of political economists. This principle is not only reflected in the recent state and federal employers' liability acts, but in the Workmen's compensation laws, pure food laws, etc. This theory is that society owes every man protection, even from the effects of his own negligence and lack of intelligence and prudence.

Recent decisions of the Supreme Court and recent other declarations of various members of the court, beginning with Justice Holmes' famous declaration in the Haskell case, that the police power of a state must be construed in the light of the dominant public opinion respecting measures regarded as essential to protect society, have prepared the bar for some of the radical changes in constitutional principles now being so frequently enunciated.

The Hammer case may be said to contain the full recognition of the new principle and the definite abandonment of the exclusively individual conception of human rights. In this case it appears that in Arizona a servant injured in his master's employment has, under the law, the option of resorting to three different remedies: first, the common law remedy based on the fault of the master; second, the remedy provided by the Workmen's Compensation Law, by which a servant may recover a fixed weekly stipend in spite of his own fault or the absence of fault on the part of his employer; third, the remedy allowed by the Employers' Liability Act, whereby the employee in certain designated hazardous enterprises is allowed to recover compensatory damages, unlimited as to amount, for every accident not caused by the fault of the servant, the question of the latter's contributory negligence being a question wholly for the jury to determine. The action in the Hammer case was brought under the third form of relief and raised the question whether the Employers' Liability Act violated the Fourteenth Amendment by making the master liable to an uncertain and unlimited penalty without fault on his part. The petition did not allege any negligence of the master, but merely stated that the plaintiff was injured in a certain manner in the course of his employment, for which compensatory damages is asked. Section 6 of the Act, which was the authority for this action, is as follows:

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in section 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in

which such injury or death of such employe shall not have been caused by the negligence of the employe killed or injured, then the employer of such employe shall be liable in damages to the employe injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employe, and, if none, then to such employe's parents; and, if none, then to the next of kin dependent upon such employe; and if none, then to his personal representative, for the benefit of the estate of the deceased."

Justice Pitney, who wrote the opinion for the court, founded his whole argument on the proposition that common law principles of tort liability are not constitutionally sacred; that they are mere rules of law, representing the conceptions of justice of the age in which they were pronounced and that a legislature is at perfect liberty to change these rules and substitute for them different rules of liability based on a new and different theory of obligation. Speaking of these common law rules, the court said:

"But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employe in the absence of legislation. They are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in defiance of natural justice, with the right of employers and employes to agree between themselves respecting the terms and conditions of employment."

The main objection to the position taken by the majority of the court was voiced by Justice McKenna, speaking also for Justices White, McReynolds and Vandevanter. He argued that the inevitable and necessary principle of all systems of justice, is that "one shall be free from liability if he is free from fault." In other words, there can be no punishment where there is no blame. If that principle is denied, Justice McKenna believes, the floodgates are opened, which will sweep away all personal security and subject the individual and his property to the whims of every changing majority. Although the present law is limited to "hazardous" occupations, there is no reason, argues Justice McKenna, why the principle should not be applied to non-hazardous occupations. "For," says Justice McKenna, "if there can be liability without fault in one occupation, and that can be a principle of legislation, why not in any other?" The learned justice then concludes his argument on this point with the solemn warning that the judgment in this case is a "menace to all rights, subjecting them unreservedly to conceptions of public policy."

Justice Pitney answers the strong objections of Justice McKenna by presupposing the existence of altogether different social conditions from those which obtained when the common law principles of tort liability were declared. Commerce and business should be regarded collectively and may properly be held responsible for all the "costs" which are inherent in the particular business. Compensation for accidental injuries, argues Justice Pitney, may properly be charged to the employer, "leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, as far as he can, in a reduced scale of wages."

This elimination of the individualistic or personal element in the relation of master and servant enables Justice Pitney to escape the effect of the argument that the decision imposes a penalty where there is no fault. "There is no question here," declares Justice Pitney, "of punishing one who is without fault." Then he proceeds to reiterate that the business, not the employer, bears the loss. He regards the employer and employee as being part of a common

undertaking, one furnishing the capital, the other furnishing labor, and both desiring and entitled to receive a reward. "Both foresee," declared Justice Pitney, "that the occupation is of such a nature, that sooner or later some of the workmen will be physically injured or maimed without particular fault on anybody's part." The fact that the liability is charged against the employer does not make it a personal liability. The employer is charged with the responsibility simply because "he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability."

Justice Holmes carries Justice Pitney's argument still further and, in his separate concurring opinion, abstractly denies the invariable application of the principle that liability rests only upon the fault of the obligor. "If," says Justice Holmes, "it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic grounds, I know of nothing to hinder." He then proceeds to show that society not infrequently requires a man to know facts at his peril and requires him to bear the consequences of certain dangerous enterprises, whether due to his fault or not. He is required to be responsible absolutely for the wrong of his agent, argues Justice Holmes, though he uses the greatest care in his selection. And "even where the criterion of fault is recognized," argues the learned Justice, "it is merely the application of an external standard,—the conduct of a prudent man in the known circumstances; that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril."

Justice Holmes is also a collectivist. He takes the impersonal view of business relations. "It is reasonable," declares Justice Holmes, "that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just."

A new day has dawned. Whether it is a better day remains to be seen. The old conservatism has departed even from the halls of justice. Old principles of law, thought to be forever true, are thrown into the junk pile with the declaration that no rule of law is necessarily true for all time and for all peoples; that the Fourteenth Amendment was not "intended to render immutable any particular rule of law." The new principle is that society may place blame and obligation where it will, irrespective of the fault of the obligor. Strange though the doctrine appears to those familiar with the strict principles of common law liability, it makes a strong pull at the heart. It might be wiser, however, for courts and legislatures to go slowly along this new path until we become more certain of our distination.

NOTES OF IMPORTANT DECISIONS.

IS A TRUSTEE LIABLE TO PAY AN INCOME TAX OUT OF THE PROPERTY OF THE BANKRUPT?—Can a bankrupt be said to have a taxable income? The Collector of Internal Revenue of New York came to an affirmative conclusion and to test same had the District Attorney sue the bankrupt Estate of Heller, Hirch & Co., to collect a tax of $2,400 on the proceeds of a compromise by the trustee of an account due the bankrupt estate which resulted in bringing into the estate the sum of $110,000.

The trial court passed the problem over to a referee, whose opinion was later adopted by the trial court and later by the Court of Appeals for the Second Circuit. In the matter of Heller, Hirsh & Co. (2nd Cir., July 31, 1919).

The referee declared he could find no decisions on the question referred to him, but as a matter of sane construction of the statute, he declared that he could not discover the slightest intimation that Congress intended to impose an income tax either upon an insolvent individual liquidating his own estate, or upon the liquidator of an insolvent individual's estate; nor is there any ground for believing that Congress intended that such insolvent individual or his liquidator should be regarded as having a "net income."

It was contended by the District Attorney that Sec. 13c of the Act of Sept. 8, 1916, made the trustee liable. But in reply to this contention the referee declared that, in terms, subdivision (c) applies only to cases where receivers or trustees in bankruptcy or assignees "are operating the property or business of corporations" and thus may be in the receipt of a "net income" as defined in the prior sections of the act. The referee stated that he regarded the quoted words as of marked significance. The referee then added:

"To my mind the subdivision was inserted in the act to meet the specified case of the profitable operation of the business of a corporation by the officers mentioned; for instance, the operation of the business of a railroad corporation by receivers or the operation of the business of a manufacturing corporation by a trustee in bankruptcy, etc., etc. In either of such cases it is quite possible that the operation of the business might result in a net income, a result which Congress sought very properly to reach (see Scott v. Western Pacific R. R., 246 Fed. Rep. 545; C. C. A., 9th Circuit, 1917, page 548). I repeat my conviction that in enacting subdivision (c) Congress had in mind the definite case so aptly described by the language used, and not the case of the officers mentioned when acting merely as liquidators."

It is interesting in this connection to note the decision of the United States Supreme Court affirming a simular construction of the federal Corporation Tax Law of Aug. 5, 1909. United States v. Whitridge, 231 U. S. 144. See also Penn. Steel Co. v. N. Y. City Ry. Co., 193 Fed. 286, 198 Fed. 774. These cases held that an insolvent corporation in the hands of a receiver was not intended to be taxed as to such assets "which had been taken over by a court through its officers to be marshalled and distributed."

EDMUND BURKE—HIS WRITINGS, SPEECHES AND CHARACTER.

The name of Edmund Burke grows in honor as the years go by. Though he was born in 1727 and died July 9, 1797, his fame does not fade, but grows brighter with each succeeding generation. both in England and America. He was never so much quoted by able men as now. Every speaker and writer of distinguished ability, discussing political questions. such questions as involve the existence of great institutions of government. and the exercise of great governmental powers. quotes Burke. "Edmund Burke said," and in almost all instances the words quoted are so manifestly true and wise that they are accepted as authoritative.

To a remarkable degree his true character is clearly shown in his public utterances; and that character. so pure, so noble. so lofty, adds much to the impressiveness of his wise words. He was not only a man of great, profound and brilliant intellect. but of the finest spirit. devoted to principle, earnest, true, courageous, "unawed by power," a lover of his fellow-men, of all mankind. In point of philosophic thought, as well as in brilliant rhetorical power. and in high moral worth, he is the foremost of British statesmen and orators.

He was an Irishman, and while through a long career a true and devoted son of England, one who profoundly loved and revered the British constitution as it was in his day, he always, as he said, "felt a very warm attachment to the place of his birth," and he labored to promote the prosperity of Ireland and the happiness of the people of that unhappy island, declaring always that it was the true wisdom of England to make Ireland prosperous, and that in so doing she would best promote her own prosperity. Well would it have been for both England and Ireland if both could have accepted and acted upon the wise ideas of Burke concerning both. It was

for him to speak the truth,—for them to see it. If they failed to see it, the fault was theirs, not his.

Many of Burke's speeches were too carefully prepared, as to their language and periods, too elaborate, too stately, to make the impression upon the members of the House of Commons that was made by the remarkable parliamentary debaters of his time. Charles James Fox and William Pitt far surpassed him in debate. Burke said of Fox that he was "the most remarkable parliamentary debater the world ever saw." Pitt was hardly, if at all, less remarkable. For years Pitt seldom failed, in concluding a debate, to carry a majority of the House with him in the division. Yet the speeches of Fox and Pitt are now but little read, while all men of high ability, who take an interest in great public affairs and who read great political literature, read, over and over, the great speeches of Burke.

The Speech to the Electors at Bristol.—The speech to the Electors was the greatest political speech I have ever read, except only Abraham Lincoln's speech at Cooper Institute. It was a justification of his course in Parliament as the representative of the city of Bristol for a period of six years, a course which in all its great features was contrary to the prevailing sentiment among the voters of Bristol, and which had made Burke unpopular. It involved his whole course concerning the American war, the question of the removal of Catholic disabilities, "Catholic Emancipation," it was called, the promotion of the Irish trade, trade between England and Ireland, and the repeal of the law by which debtors were imprisoned because they were debtors and unable to pay. On all these great questions and concerns Burke was profoundly right—wise, just, humane, far-seeing, a lover and advocate of liberty and humanity, and of the true interests of his country. And on all these questions, questions of as great importance as could well arise in any one man's lifetime, the majority of his constituents were wrong, blindly, stubbornly, bitterly wrong; and his very virtues, his sense of justice, his wisdom, his courage, his devotion to what he termed "the true rights of men," his great love for his country and his countrymen, and for humanity, made him unpopular in the great city of Bristol and throughout England. Very brave and noble and wise and splendid was his justification of his course in that remarkable speech.

It will be interesting and enlightening to quote some passages from that famous speech. So far was he from making the least apology for his course as to the American war, that he said: "I confess to you freely that the suffering and distress of the people of America in this cruel war have at times affected me more deeply than I can express. I felt every gazette of triumph as a blow upon my heart, which has an hundred times sunk and fainted within me at all the mischiefs brought upon those who bear the brunt of war in the heart of their country. Yet the Americans are utter strangers to me; a nation among whom I am not sure that I have a single acquaintance."

He spoke of "the beginnings of the American war" as "that era of calamity, disgrace, and downfall, an era which no feeling mind will ever mention without a tear for England."

Touching both the American war and Irish trade, as to both of which he refused in Parliament to obey "instructions sent to him by his constituents, which refusal to obey was one of the offenses charged against him, he said: "I did not obey your instructions. No. I conformed to the instructions of truth and Nature, and maintained your interest, against your opinions, with a constancy that became me. I knew that you chose me, in my place, along with others, to be a pillar of the state, and not a weathercock on the top of the edifice, exalted for my levity and versatility, and of no use but to indicate the shift-

ings of every fashionable gale." And touching the matter of instructions, he further finely and bravely said: "When we know that the opinions of even the greatest multitudes are the standard of rectitude, I shall think myself obliged to make those opinions the masters of my conscience."

Concluding this large and splendid discourse on all these subjects, he said: "It is but too true that the love, and even the very idea, of genuine liberty is extremely rare. It is but too true that there are many whose whole scheme of freedom is made up of pride, perverseness, and insolence. They feel themselves in a state of thraldom, they imagine their souls are cooped and cabined in, unless they have some man or some body of men dependent on their mercy. This desire of having some one below them descends to those who are the very lowest of all; and a Protestant cobbler, debased by his poverty, but exalted by his share of the ruling church, feels a pride in knowing it is by his generosity alone that the peer whose footman's instep he measures is able to keep his chaplain from a jail. This disposition is the true source of the passion which very many men in very humble life have taken to the American war. *Our* subjects in America; *our* colonies; *our* dependents. This lust of party power is the liberty they hunger and thirst for; and this siren song of ambition has charmed ears that one would have thought were never organized to that sort of music."

Though I have quoted at such length from this great speech, I must add its closing words, for, as I said, to a remarkable degree Burke's character is expressed in his speeches. He said: "It is certainly not pleasing to be put out of the public service. But I wish to be a member of Parliament to have my share of doing good and resisting evil. It would, therefore, be absurd to renounce my objects in order to retain my seat. I deceive myself indeed most grossly if I had not much rather pass the remainder of my life hidden in the recesses of the deepest obscurity, feeding my mind even with the visions and imaginations of such things, than to be placed on the most splendid throne of the universe, tantalized with a denial of the practice of all which can make the greatest situation any other than the greatest curse."

In writing of Burke no American can fail to mention his two wonderful speeches in the House of Commons, while he represented Bristol, on American affairs, one on "American Taxation," the other on "Conciliation with America," which, if they had been heeded, would have avoided the American Revolution and would have preserved the American Colonies to England, doubtless for a long time. Those speeches are of course better known to Americans than are any others of his great career. They are included in the literary courses of study in our high schools, and so known, in a way, to our school boys, though I have known few men who seemed to have any appreciation, if indeed any knowledge, of them. There are no two speeches in the Parliamentary history of England more wonderfully wise than those speeches of Burke. Speaking as he was against "the fates," to a hostile majority, the members were deeply interested and impressed by the speech on American Taxation.

No one of our own great Americans of that time or in all our history has stated the case of our Colonies better than Burke stated it in that speech, in the following words: "Sir, let the gentlemen on the other side call forth all their ability; let the best of them get up and tell me what one character of liberty the Americans have, and what one brand of slavery they are free from, if they are bound in their property and industry by all the restraints you can imagine in commerce, and at the same time are made the packhorses of every tax you choose to impose, without the least share in granting them. . . . The Englishman in America will feel that this is slavery. That it is *legal* slavery will be no compensation either to his feelings or his under-

standing. . . . If your sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face." How well he understood!

The speech on "Conciliation" was even more remarkable. One will hardly in a lifetime read a speech containing more of wisdom and foresight—if indeed so much. It reads now like prophecy fulfilled. It is just that. It is so full of wisdom for all generations that it cannot be too often read, too carefully studied. Speaking against the exercise of arbitrary power, he said: "None of us who would not risk his life rather than fall under a government purely arbitrary." Very fine is that famous saying: "Magnanimity in politics is not seldom the truest wisdom; and a great empire and little minds go ill together." "Let the colonies always keep the idea of their civil rights associated with your government—they will cling and grapple to you, and no force under heaven will be of power to tear them from their allegiance." . . . "Freedom and not servitude is the cure of anarchy; as religion and not atheism is the true remedy for superstition." . . "Men are every now and then put by the complexity of human affairs, into strange situations; but justice is the same, let the judge be in what situation he may." . . . "I do not know the method of drawing up an indictment against a whole people."

Letter to the Sheriffs of Bristol.—One of the most remarkable of all the writings of Burke is his letter to the Sheriffs of Bristol, written in 1777, the year following our Declaration of Independence, concerning his attitude toward the Americans. No one of his writings contains more of his sayings which appeal to thoughtful men of all times; and as showing the greatness of his mind and his noble character, I quote some of those sayings, though disconnected from the context:

"I take it for granted, gentlemen, that we sympathize in a proper horror of all punishment further than as it serves for an example."

"It is by lying dormant a long time, or by being at first rarely exercised, that arbitrary power steals upon a people."

"The poorest being that crawls on earth, contending to save itself from injustice and oppression, is an object respectable in the eyes of God and man."

"Power, in whatever hands, is rarely guilty of too strict limitations on itself."

"Liberty must be limited in order to be possessed."

"If I were ready on any call of my own vanity or interest, or to answer any election purpose, to forsake principles (whatever they are) which I had formed at a mature age, on full reflection, and which had been confirmed by long experience, I should forfeit the only thing which makes you pardon so many imperfections in me." (There seems to me to be in this passage real moral grandeur.)

"All who have ever written on government are unanimous that among a people generally corrupt liberty cannot long exist."

Impeachment of Warren Hastings.—One of the greatest of Burke's Parliamentary labors, the longest continued and most arduous, indeed, the very greatest, was in relation to the affairs of India, the government of India by Great Britain through the East India Company and its agents; for which arduous labors he will be forever remembered; and for the splendor of the abilities displayed by him he will be forever admired. He made himself master, by astonishing toil, of the whole state of affairs in India under the rule of the company. He came to know India as he knew America. His upright mind and just and humane spirit were profoundly moved by the unspeakable corruption and tyranny of the agents of the company in control of the government of India. For fourteen years he labored to put an end to the corruption and the tyranny, and to

bring to justice, as he thought, the chief offender, his labors culminating and ending in the great impeachment proceedings against Warren Hastings. The great accused was indeed acquitted by the Lords after the trial had "dragged its slow length along" through a period of eight years, the long delay brought about by those who sat in judgment.

The prosecution of Hastings, guilty as he was, was warranted and indeed necessary to the accomplishment of Burke's grand designs and purposes. His conviction was not essential. The trial of Hastings was the trial of the East India Company and of the British Administration in India, and it brought their criminal rule to an end, never after to be resumed, and opened a vast future for India which shall yet be glorious. This is truly Burke's crowning glory. And what makes this crowning glory so imperishable and so bright, and ever brighter, is the fact that in it all he was wholly unselfish, actuated by no selfish ambition, prompted and sustained only by his broad and profound love of liberty, justice and humanity. For that noble spirit that animated him in the whole struggle for India and through all of his long public life, more even than for his marvelous intellectual powers, "his fame will grow with the centuries."

In the year 1793, Fox, so long the great leader of the Whig party, introduced in the House of Commons a Bill, chiefly drawn by Burke, for the relief of India; and Burke who knew far more of the subject than any other man, on the first day of December of that year, made a famous speech in support of the Bill, from which I quote some passages, only for the purpose of showing the true greatness of his mind and the noble spirit of the man. Much had been said in behalf of the Company, about its charter and "the chartered rights of *men*." Burke said:

"It is not difficult to discover what end that ambiguous mode of expression is meant to answer. The rights of *men*—that is to say, the natural rights of mankind—are indeed sacred things; and if any public measure is proved mischievously to affect them, the objection ought to be fatal to that measure, even if no charter at all could be set up against it. If these natural rights are further affirmed and declared by express covenants, they are in a still better condition; they partake not only of the sanctity of the object so secured, but of that solemn public faith itself which secures an object of such importance. The charters which we call by distinction *great* are public instruments of this nature; I mean the charters of King John and King Henry the Third. The things secured by these instruments may, without any deceitful ambiguity, be very fitly called *'the chartered rights of men.'*

"These charters have made the very name of a charter dear to the heart of every Englishman,. But, sir, there may be, and there are, charters not only different in nature, but formed on principles *the very reverse* of those of The Great Charter. *Magna Charta* is a charter to restrain power and to destroy monopoly. The East India charter is a charter to establish monopoly and to create power. Political power and commercial monopoly are *not* the rights of men; and the rights to them derived from charters, it is fallacious and sophistical to call 'the chartered rights of *men.*'

"Parliament has no right," Burke continued, "to sell the blood of millions of men for the base consideration of money. We sold, I admit, all that we had to sell—our authority, not our control. We had not a right to sell our duties."

As the East India affairs progressed in the House of Commons, "a ghost that would not down," Burke delivered his famous speech on "The Nabob of Arcot's Debts," one of the most extraordinary speeches in the annals of Parliamentary discussion.

The debts of the Nabob of Arcot to the Company, and especially to its agents, principally to its agents and servants and their money-lending associates, debts mostly "fictitious," imposed with iron hand and with utter unscrupulousness and heartlessness, ran into amounts of hundreds of thousands of pounds, bearing "a usury the most completely ruinous that probably ever was heard of; that is, forty-eight per cent, payable monthly, with compound interest," —nearly all of the debts being not only what would now be called "graft," but worse than "graft," debts for which the debtor had received no consideration, not mere "graft," but sheer forcible robbery. The speech exposed with marvelous eloquence and power the methods by which the robbers and their agents and attorneys were chosen to seats in the House of Commons, where their presence might be needed if there should be danger that "the golden cup of abominations, the chalice of the fornications of rapine, usury and oppression," might be held up to the public gaze.

Finally the Indian affairs, after many struggles, reached the stage in which the House of Commons determined to impeach Warren Hastings for "high crimes and misdemeanors," and the time when the great trial came on in the House of Lords. It was the greatest of all trials. The charges were many and grave, and the facts were innumerable and complicated, covering a long period, and of more profoundly interesting character than were ever involved in any other trial.

As all men know, Burke opened the trial in a speech of four sittings of the Lords, laying the whole case in its broad outlines before the court. The subject was vast. I cannot go into the merits of the speech at any length. Hastings had, as a matter of defense, asserted that as Governor-General he had the arbitrary power and had exercised it; the argument being that he could not be held accountable for anything he did in the exercise of such arbitrary power. In replying, Burke said: "I believe that till this time so audacious a thing was never attempted by man. *He* have arbitrary power! My Lords, the East India Company have no arbitrary power to give him; the king has no arbitrary power to give him; your Lordships have not; nor the Commons, nor the whole legislature. We have no arbitrary power to give, because arbitrary power is a thing neither any man can hold nor any man can give."

"Law and arbitrary power are in eternal enmity."

"Man is born to be governed by law; and he that will substitute his *will* in the place of it is an enemy to God."

I will quote one other short sentence from the speech. Burke knew the power of the great accused, and the rich and powerful influences behind him. Among many other warning words, he said: "But God forbid it should be bruited from Pekin to Paris that the laws of England are for the rich and the powerful, but to the poor, the miserable, and defenseless they afford no resource at all."

The great scene in the opening days of the trial, the days of Burke's opening speech, has been so brilliantly described by Macaulay that no other description should ever be attempted.

"There was Burke," said Macaulay, "ignorant indeed, *or negligent* of the art of adapting his reasonings and his style to the capacity and taste of his hearers, but in *amplitude of comprehension* and richness of imagination superior to every orator, ancient or modern." The charges were first read by "the clerk of the court," occupying two days. "On the third day Burke rose. Four sittings were occupied by his opening speech, which was intended to be a general introduction to all the charges. With an *exuberance of thought* and a splendor of diction which more than satisfied the highly raised expectation of the audience, he described the character and institutions of the natives of India, recounted the circum-

stances in which the Asiatic empire of Britain had originated, and set forth the constitution of the Company and of the English presidencies. Having thus attempted to communicate to his hearers an idea of Eastern society as vivid as that which existed in his own mind, he proceeded to arraign the administration of Hastings as systematically conducted in defiance of morality and public law. The energy and pathos of the great orator *extorted expressions of unwonted admiration from the stern and hostile Chancellor,* and for a moment seemed to pierce even the resolute heart of the defendant. The ladies in the galleries, unaccustomed to such displays of eloquence, excited by the solemnity of the occasion, and, perhaps not unwilling to display their taste and sensibility, were in a state of uncontrollable emotion. Handkerchiefs were pulled out; smelling bottles were handed round; hysterical sobs and screams were heard; and Mrs. Sheridan was carried out in a fit. At length the orator concluded. Raising his voice till the old arches of Irish oak resounded, "Therefore," said he, "hath it with all confidence been ordered by the Commons of Great Britain, that I impeach Warren Hastings of high crimes and misdemeanors. I impeach him in the name of the Commons' House of Parliament, whose trust he has betrayed. I impeach him in the name of the English nation, whose ancient honor he has sullied. I impeach him in the name of the people of India, whose rights he has trodden under foot, and whose country he has turned into a desert. Lastly, in the name of human nature itself, in the name of both sexes, in the name of every age, in the name of every rank, I impeach the common enemy and oppressor of all." Macaulay also said of the speech in his essay on Madame De'Arblay (Fanny Burney), that "it was a speech that had a mighty effect, and that no other orator that ever lived could have made."

Reflections on the French Revolution.—In the midst of the long controversy that arose in England over the French Revolution, Burke wrote and published the "Reflections." It was brilliantly written and made a tremendous impression. Many thousands of copies were sold. It carried over to Burke's views the great majority of the people. He became a greater figure in the eyes of the people than he had ever been.

In this essay Burke stood for the constitution as it was against anarchistic ideas and courses. Well it has been and is for England that from his day to this, sane democratic ideas have grown and are growing in the minds of her people, modifying their institutions and society, quietly, steadily, without violence and bloodshed and anarchy, the thoughts of men "widened with the process of the suns."

Before leaving the "Reflections," I will quote from its pages some sayings, apart from the context, as I have done from his speeches.

Speaking of the preacher in politics, he said: "Supposing that something like moderation were visible in this political sermon, yet politics and the pulpit are terms that have little agreement. No sound ought to be heard in the church but the healing voice of Christian charity. The cause of civil and religious liberty gains as little as that of religion by this confusion of duties. Those who leave their proper character to assume what does not belong to them are, for the greater part, ignorant of the character they leave and the character they assume. Wholly unacquainted with the world in which they are so fond of meddling, and inexperienced in all its affairs, on which they pronounce with such confidence, they have nothing of politics but the passions they excite. Surely the church is a place where one day's truce ought to be allowed to the dissensions and animosities of mankind."

"Justice is the common concern of mankind," declared Burke in one of his greatest epigrams. Of the legal profession he said: "God forbid I should insinuate anything derogatory to that profession which is another priesthood, administering the rights of

sacred justice." Mr. Root has, in our day, finely spoken of the members of the profession as "priests in the temple of justice." Would they were all worthy! Of the science of the law Burke said, "The science of jurisprudence, the pride of the human intellect, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."

"All persons possessing any portion of power ought to be strongly impressed with the idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author, and Founder of society."

Estimates of His Life and Influence.—It would be interesting to relate many incidents of Burke's life, to tell of his long-time association with and warm friendship for old Samuel Johnson and Sir Joshua Reynolds and Goldsmith and Garrick and the rest, all so brilliant, all historic; his membership in their famous Club, his uniformly courteous and deferential treatment of the gruff old Samuel, his remarkable conversational powers that so often put the wonderful old talker to a severe test. These and many other such things one would love to dwell on. But they are hardly within the scope of the title of this paper or of its purpose.

Thomas DeQuincey, in one of the finest of his essays, has a passage about Burke, in which he said: "He was a man of fancy in no other sense than as Lord Bacon was so, and Jeremy Taylor, and as all large and discursive thinkers must be; that is to say, the fancy which he had in common with all mankind, and very probably in no more eminent degree, in him was urged into unusual activity under the necessities of his capacious understanding. His great and peculiar distinction was that he viewed all objects of the understanding under more relations than other men, and under more complex relations. According to the multiplicity of these relations, a man is said to have a *large* understanding: according to their subtlety, a *fine* one; and in an angelic understanding all things would appear to be related to all."

With an understanding so capacious, at once so large and fine, Burke had a spirit, a heart, large enough to comprehend humanity. He was, as Franklin said of Washington, "the friend of mankind."

JAMES B. SWING.

Cincinnati, Ohio.

INSURANCE—INSURABLE INTEREST.

MILLIKEN v. HANER et al. (two cases).

Court of Appeals of Kentucky. June 13, 1919.

212 S. W. 605.

Assignment of life policy to assignee having no insurable interest in life of insured is void, being against public policy.

THOMAS, J. Henry E. Haner procured to be issued on his life two policies each for the sum of $1,000. One of them was issued by the Equitable Life Assurance Society of the United States, and the other by the Metropolitan Life Insurance Company of New York. The plaintiff and appellee, J. H. Haner, the father of the insured, was made the beneficiary in each of the policies, the first one of which was issued in 1906, and the last one in 1909. About September 1, 1911, the insured, having become afflicted with tuberculosis, concluded to go West in search of health. He was without the necessary funds to make the trip, and to procure them he, on the 8th day of that month, agreed to and did assign the two policies with the consent of the beneficiary to the appellant and defendant below, J. J. Milliken, and the assignments were afterwards reduced to writing and duly acknowledged before a notary public by both the insured and the beneficiary, and with the consent of the two companies they were attached to the policies. The consideration for the assignment of the policy issued by the Equitable Company was $209.42, and for the assignment of the one issued by the Metropolitan was $150, the de-

fendant and assignee agreeing to pay the annual premiums on each of the policies accruing thereafter, which he did.

Near December 1, 1916 (the exact date not being shown), the insured died intestate and leaving no widow or children. Proof of his death was made and furnished to each of the insurance companies, both of which acknowledged the liability and a willingness to pay, but did not know whom they should pay, since both defendant Milliken and plaintiff Haner (the beneficiary) claimed the right to collect the policies. While matters were in this condition plaintiff, the beneficiary, filed these suits, one against defendant Milliken and the Metropolitan Company, and the other against him and the Equitable Company, seeking to recover the amount of the policies and alleging that Milliken claimed to own them, which plaintiff denied, and he was called on to answer and set up the facts with reference to his claim, which he did by relying upon the assignment to him as heretofore shown and insisted upon his right to collect the entire amount of each policy. A demurrer was filed and sustained to his answer, and he amended it, in which he set up the consideration paid by him for each assignment and the amount of premiums which he afterwards paid to each of the companies and when paid, and insisted upon his right to collect the amount of money with interest which he had thus paid out, even though the assignments should be adjudged invalid.

A reply denying want of knowledge or information sufficient to form a belief as to the amounts paid by defendant completed the issues and upon trial the court adjudged the assignments invalid as being against public policy (the defendant having no manner of insurable interest in the life of insured), but gave judgment in favor of defendant for the sums he had paid for the assignments and in the way of premiums, with interest thereon from the respective dates of payment, and to reverse that judgment defendant prosecutes this appeal.

A cross-appeal has been asked by and granted to the plaintiff in which he seeks a correction of an alleged error of the court in allowing defendant interest on the sums he paid after 60 days from the date of the proof of the death of the insured; it being the time when the payment of the policies became due and, as insisted, would have been made but for the claim of defendant.

On the main question presented by the appeal it is admitted that the defendant had no such insurable interest in the life of Henry E. Haner as would entitle him to have taken out the policies originally in his favor. It is further admitted that under the law as approved by this court and many others, and as also announced by all the text-writers, one who has no such insurable interest in the life of another cannot take out a policy on the latter's life payable to himself, since such transactions are wagering contracts and against public policy. Griffin's Adm'r v. Equitable Assurance Society, 119 Ky. 856, 84 S. W. 1164, 27 Ky. Law Rep. 313; Bromley v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057, 18 Ky. Law Rep. 1029; Baldwin v. Haydon, 70 S. W. 300, 24 Ky. Law Rep. 900; Wrather v. Stacey, 82 S. W. 420, 26 Ky. Law Rep. 683; Lee v. Mutual Life Ins. Co., 82 S. W. 258, 26 Ky. Law Rep. 577; Barbour v. Larue, 106 Ky. 546, 51 S. W. 5, 21 Ky. Law Rep. 94; Basye v. Adams, 81 Ky. 368; Lockett v. Lockett, 80 S. W. 1152, 26 Ky. Law Rep. 300; Scott v. Scott, 77 S. W. 1122, 25 Ky. Law Rep. 1356; Adams v. Reed, 38 S. W. 420, 18 Ky. Law Rep. 853, 35 L. R. A. 692; Bramblett v. Hargis, 123 Ky. 141, 94 S. W. 20, 29 Ky. Law Rep. 610; Hess v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 36 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1112, 128 Am. St. Rep. 343; Western & Southern Life Ins. Co. v. Webster, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271; Western & Southern Life Ins. Co. v. Nagel, 180 Ky. 476, 203 S. W. 192; and many other cases which could be cited.

But while admitting this general and universally applied principle of law, defendant's counsel insists that there is a sound distinction between procuring the issual of a policy in which the beneficiary has no insurable interest in the life of the insured and the assignment of a policy to one without insurable interest if the original beneficiary was one to whom the policy could be made payable within the rule requiring him to have an insurable interest. This alleged distinction is attempted to be maintained upon the theory that the policy, bein valid when issued, is after that a mere chose in action and assignable as such. The courts in a few of the states adopt the distinction contended for, among them the Court of Appeals of New York, and we are cited to the case of Steinbeck v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 418, 70 Am. St. Rep. 424, in support of this contention.

The opinion in that case seems to place the Court of Appeals of that state in line with the

limited number recognizing the distinction contended for, but, after a careful reading of it, we are by no means convinced of the soundness of its reasoning in support of such distinction. In fact, we fail to find any reason in it which would relieve the assignment of a policy to one without an insurable interest in the life of the insured from being a wagering contract any less than the procuring of the policy originally by and for the benefit of one without such interest would be.

The underlying reason for the rule forbidding the issual of such policies is that the stranger beneficiary is thereby given a financial interest in the quick termination of the insured's life, and to that extent has a motive to bring about that result; and, since such conditions might possibly encourage crime, the rule has been invoked to prevent them from arising. We are unable to see why the same reason would not exist with reference to the assignment of a policy to one who was without legal interest in the life of the insured. We find no satisfactory reason for any difference between the two cases anywhere stated in the Steinbeck case relied on, and the same is true with reference to the cases from other courts recognizing the distinction. But in the opinion rendered in that case the court referred to a number of cases denying the validity of an assignment of an insurance policy to one having no insurable interest in the life of the insured, among which are the cases of Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924, and Basye v. Adams, supra, from this court.

Wherefore the judgment on the original appeal is affirmed, but reversed on the cross-appeal, with directions to modify it as herein indicated.

NOTE—*Assignment of Insurance to One Without Insurable Interest in Life of Insured.*—The instant case is opposed to a great, if not the greater, weight of authority. Among the courts standing in line with it is the Supreme Court of Appeals of Virginia. Crismond v. Jones, 83 S. E. 1045. Therein it was said: "It is a settled principle in our American jurisprudence that one taking out a policy of insurance on the life of another person for his own benefit must have an interest in the continuance of the life of the insured, and this court has repeatedly held that the assignee of a life policy or the proceeds thereof must have an insurable interest in the life of the insured." Here are cited cases from that state reported in 6 L. R. A. 136; 44 L. R. A. 305; 45 L. R. A. 243, 75 Am. St. Rep. 770.

In Roller v. Moore, 86 Va. 512, 10 S. E. 241, reported in 6 L. R. A., *supra*, it was said: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy." To this is cited, among other cases, that of Warnock v. Davis, 104 N. S. 779, 26 L. ed. 924. The Warnock case has been cited on both sides of the proposition and as matter of fact it was not a case of assignment of a policy. But N. Y. M. L. Ins. Co. v. Armstrong, 117 U. S. 597, 29 L. ed. 999, does speak of assignability of a policy, saying: "A policy of life insurance, without restrictive words, is assignable by assured for a valuable consideration equally with any other chose in action, when the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies."

In N. Y. L. Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, another of the cases referred to as appearing in 44 L. R. A., *supra*, and it was ruled that a policy was forfeited only to the extent of the premiums paid by an assignee who had murdered the assured. This presupposes that had he not have been murdered this would have been the extent of his interest in the policy. This refines very closely on the working of public policy.

But other states think that when a policy has been legally issued to one insured and there is vested in him the right to assign same, this right is general and he may assign it to one having no insurable interest in his life. See Wheeland v. Atwood, 192 Pa. 237, 73 Am. St. Rep. 803; Clement v. Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650; Steinbeck v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 418, 70 Am. St. Rep. 424.

Lee v. Eq. L. A. Soc., 195 Mo. App. 40, 189 S. W. 1195, after stating that the rule is settled in Missouri that a contract with a stranger to insure another's life is void against public policy, says: "But the rule and the reason for it, do not find application to insurance taken only by the assured himself for the benefit of one not having an insurable interest in his life. * * * Every reason exists for applying the distinction, or exception, to the general rule, to instances where the assignment of the policy is made by the assured to one not having an insurable interest in his life." One easily might perceive that an assignee who is to pay the premiums on a policy more resembles one taking out a policy on another's life than does the beneficiary in a policy taken out by assured. And, therefore, this Missouri case seems to me to go further than do the cases which sustain an assignment where it is not taken by way of cover for a wager policy.

In Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, the assignment was sustained, but it was said that: "One cannot

do indirectly what the law prohibits him from doing directly, and as it is unlawful for a person to effect insurance upon the life of another in the continuance of whose life he has no interest, an evasion of this rule by the issue of a policy to one who has an insurable interest and its immediate assignment, pursuant to a preconceived intent, to one without such interest, who undertakes to pay the premiums for his chance of profit upon his investment, is ineffective and such an assignment is void." Considering, however, the facts in the Rylander case, in which there was no indebtedness to be secured, it does look like no other conclusion could have been arrived at, than that the assignee was merely speculating on the length of a life.

In Potvin v. Prudential Ins. Co., 225 Mass. 247, 114 N. E. 292, the court, quoting from a prior case, said: "The law in this commonwealth has been settled and it is now held in accordance with what seems to be the great weight of authority, that in the absence of any evidence indicating that the transaction was intended as a wagering contract, it is not necessary that the beneficiary or assignee should have an insurable interest."

In Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, it was held that an assignment by an insured of a perfectly valid policy to one without insurable interest for a valuable consideration, the assignee to pay future premiums passed to him as against the heirs of the insured.

Justice Holmes said: "Life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property." This justice was influenced by this character of reasoning, saying also "the law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's case." But, then, if there has been a rule under public policy against wager policies, it seems not within discretion of a federal court to set aside state ruling on a judge's individual view. Therefore, the judge says: "It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the Supreme Court of that state came to the conclusion that we adopt Lewis v. Edwards, December 14, 1903." Considering that the Grigsby case was decided in 1911, that case should by then have been reported. The law on this subject seems, therefore, greatly unsettled, though the greater weight of opinion seems as set out in Rylander v. Allen, *supra*, and the general effect of that is to put the burden on one attacking claim by assignee of a policy to show, it was assigned for speculative purposes or thus accepted. C.

HUMOR OF THE LAW.

"You say you were held up by a man who made you put up only one hand. I never heard of such a highwayman."

"He wasn't a highwayman, he was a Judge. He made me swear that I would pay the alimony he allowed my wife."

Patrick O'Riarty was up before the "beak," charged with assault and battery.

The magistrate fixed him with an eagle eye, and demanded if he was guilty.

The Irishman looked bewildered.

"How can I tell, your honor," said he, "till I've heard the evidence?"

Mr. W., a prominent Hebrew, who saw an accident, and afterwards took much interest in a suit for damages by the injured person, was approached by Mr. H., the defendant's lawyer, who was also a Hebrew and a friend of his, and asked why he took such an interest against him in that case. He answered that the claim was just and ought to be paid. The next day on the trial of the case, having testified for the plaintiff, he was cross-questioned by his friend, the attorney, as follows: Question: "Mr. W., haven't you taken a good deal of interest in this case?" Answer: "Yes, sir." Question: "Haven't you been telling around, that you knew this plaintiff would get a verdict?" Answer: "I have made that statement to but one person—that was to you, Mr. H." Question: "Well, sir, haven't you even offered to bet a suit of clothes that the plaintiff would win this case?" Answer: "Well, I did make that offer to you, Mr. H., and the offer is still open." The judge quickly turned his face to the wall, but seemed taken with a sudden convulsion. The verdict was for the plaintiff.

Whenever a certain judge could get a day off in the summer he would go out fishing in his little motor boat, taking "Web" Campbell along to manage it for him. One day Web found some difficulty in starting the boat, and while he investigated the trouble he absent-mindedly laid the crank down on the dock. He soon had the trouble adjusted and reached out for the crank, but the boat had drifted far away from the dock.

"What's the matter?" demanded the judge gruffly. "Haven't we a crank on board?"

"We have," replied Web significantly, "but he's of no d—— use in the present emergency."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy** — Insolvency. — Insolvency, within the definition of Bankruptcy Act July 1, 1898, § 1 (Comp. St. § 9585), may, and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred.—Rosenberg v. Semple, U. S. C. C. A., 257 Fed. 72.

2.——New Promise.—If a bankrupt's new promise to pay a debt is conditional, the happening of the contingency must be stated by the pleader in an action to enforce the promise, and such happening of the contingency must be proved.—Dantzler v. Scheuer, Ala., 82 So. 103.

3. **Bills and Notes**—Indorsement.—A check on one bank payable to depositor, and not to order or bearer, and indorsed by the depositor for deposit only to its credit, and deposited in another bank, is not a negotiable instrument.—Sweetwater Ice & Cold Storage Co. v. Continental State Bank of Sweetwater, Tex., 212 S. W. 740.

4.——Payment.—A new note is not payment of an old note, where each evidences the same debt, and old note is retained by payee as security for new one.—Silver Lake State Bank v. Georgia, Kan., 181 Pac. 574.

5.——Presentment of Check.—By Negotiable Instrument Law, a check must be presented for payment within a reasonable time after its issue, although not at the earliest opportunity, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.—Empire-Arizona Copper Co. v. Shaw, Ariz., 181 Pac. 464.

6. **Boundaries**—Oral Agreement.—An oral agreement between adjoining landowners, establishing an unascertained or disputed boundary line, is executed, so as to be binding, when they procure a survey and definitely mark out such line as is agreed upon, or do so themselves.—Brooks v. Goodin, Ga., 99 S. E. 540.

7.—**Brokers**—Exclusive Agency.—Where owner of land did not give a broker exclusive right to sell, at any time before the broker procured and presented a purchaser ready, able, and willing to buy on the owner's terms, the owner had a right to sell the land himself.—Irwin v. Moore, Tex., 212 S. W. 710.

8. **Burglary**—Recent Possession.—The entry of a store through a break in the window glass, without any breaking, actual or constructive, is not burglary.—Tremble v. State, Ga., 99 S. E. 544.

9. **Commerce**—State Tax.—While the state may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect, in the tax imposed, to burden commerce of that character.—American Can Co. v. Emmerson, Ill., 123 N. E. 581.

10.——Workmen's Compensation Act.—Excavation of ditch by interstate pipe line company, preparatory to laying gas pipe parallel to an existing main line and to be connected therewith to increase its carrying capacity, is no part of company's commercial business, but is separable therefrom, in performance of which company is unconditionally subject to the Workmen's Compensation Act.—Roberts v. United Fuel Gas Co., W. Va., 99 S. E. 549.

11. **Contracts**—Acceptance of Statements.—One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.—Shermaster v. California Home Bldg. Loan Co., Cal., 181 Pac. 409.

12.——Employment.—A contract which bound an insurance company to employ an agent for five years, and bound the agent to work for that period unless the contract should be sooner terminated in one of the methods stipulated, and providing for compensation by a percentage on new and renewal insurance premiums, held not void for want of mutuality.—Merchants' Life Ins. Co. v. Griswold, Tex., 212 S. W. 807.

13.——Reliance on Representation.—To avoid a contract for fraud or misrepresentation, it is not necessary that the fraud should have been the sole cause of making the contract, but sufficient if the fraudulent representation was relied on to the extent that it was a material factor in inducing the making of the contract.—Hart-Parr Co. v. Krizan & Maler, Tex., 212 S. W. 835.

14.——Repudiation.—The right to repudiate a contract for the default of the other party thereto cannot be exercised by a party who is him-

self in unexcused default of performance of an essential covenant thereof.—White Oak Fuel Co. v. Carter, U. S. C. C. A., 257 Fed. 54.

15. **Corporations** — Fraudulent Representations.—Fraudulent representations as to dividends and value of property owned by a corporation may be set up as a defense in an action by the corporation on notes given for stock.—Appalachian Corporation v. Ayo, La., 82 So. 89.

16.——Malice.—Since a corporation is liable for a malicious act on proof which would make an individual liable, a corporation is liable in slander, if the slanderous words are voluntarily uttered by its officer, agent, or servant in the course of his employment, as well as when uttered by the direct authority of the stockholders or directors.—Mills v. W. T. Grant Co., Mass., 123 N. E. 618.

17.——Stock for Property.—Where stock is issued for property having no generally defined value, the rule is that where the corporation and stockholders have agreed upon a given valuation for the property such valuation is binding and conclusive, unless it is fraudulent in purpose or effect.—Hasson v. Koeberle, Cal., 181 Pac. 387.

18.——Subscription.—Where a subscriber to corporate stock, claiming he was induced to subscribe by fraud, took no action toward rescinding the subscription for two years, when he began suit, it will be presumed that in the two years credit was given the company, and his suit is barred by laches involving creditors of the company.—Van Gilder v. Eagleson, Col., 181 Pac. 538.

19.——Subscription.—A stockholder is liable as such, although he has paid no money, property, or anything of value for stock for which he has subscribed and which has been issued to him.—Jensen v. Aikman, Idaho, 181 Pac. 525.

20. **Costs**—Apportionment.—Where a large part of the cost was made in trying to prove groundless charges against defendant, and he was largely the prevailing party and successfully defended against most of claims against him, the cost item should be divided into two parts, and only one part allowed as costs to plaintiff.—Farmers' Security Bank of Park River v. Verry, N. D., 172 N. W. 867.

21. **Covenants**—Breach.—If there was an outstanding estate in remainder in a third person when the covenantor executed his deed to plaintiff, covenants that the premises were free from incumbrances were broken.—Mixon v. Burleson, Ala., 82 So. 98.

22.——Warranty.—There is nothing to prevent a person from warranting title to land that he neither owns nor claims, and the grantee had a right to stand on the terms of his deed.—Keith Lumber Co. v. Houston Oil Co. of Texas, U. S. C. C. A., 257 Fed. 1.

23. **Criminal Law**—Accessory Before the Fact.—Where all the acts of an accessory before the fact are committed in a different jurisdiction from that in which the principal offense was committed, the accessory may be indicted, tried, and convicted in the same court and county in which the principal felon is indicted and tried.—Elliott v. State, Fla., 82 So. 139.

24.——Justifiable Homicide.—A charge that one setting up the defense of justifiable homicide must be without fault at time of killing and in the particular act of killing which does not mean that he must be without any fault during the entire transaction, authorized by the evidence, in connection with entire charge on subject, was not erroneous.—Glenn v. State, Ga., 99 S. E. 531.

25. **Damages**—Mental Suffering.—If the natural consequences of a wrongful act done willfully, or with gross negligence, is mental suffering to plaintiff, such element may be considered in assessing his damages.—Stiles v. Morse, Mass., 123 N. E. 615.

26.——Overflowed Land.—Where crops have been planted and are growing or have matured and are yet on the land, plaintiff is entitled to recover for their destruction from overflow caused by defendant's wrongful act the reasonable value of such crops at the time and place of destruction.—Ft. Worth & D. C. Ry. Co. v. Speer, Tex., 212 S. W. 762.

27. **Deeds**—Writing and Print.—If there is any conflict in a deed between the printed part and the part written in, the written part, in construing it, will control.—Wilson v. Harrold, Ill., 123 N. E. 563.

28. **Divorce**—Condonation.—In view of Civ. Code, §§ 117, 121, extreme cruelty of a wife towards the husband consisting of the filing of a petition for divorce containing a false charge of adultery cannot be regarded as condoned by the husband by his act in thereafter living with the wife, where such act was induced by a promise of the wife to conduct herself properly, which promise she broke by committing fresh acts of misconduct.—Broderick v. Broderick, Cal., 181 Pac. 402.

29.——Insanity.—Divorce may be had from an insane defendant for a cause of action which accrued during defendant's sanity.—Steed v. Steed, Utah, 181 Pac. 445.

30. **Ejectment**—Equitable Title.—In the federal courts one cannot recover land in an action of ejectment on an equitable title only.—McGrew v. Byrd, U. S. C. C. A., 257 Fed. 66.

31.——Mesne Profits.—Generally in an action for mesne profits plaintiff may recover the annual worth or rental value of the land from the time of the accruing of his title, and the amount of mesne profits may be sometimes ascertained by proving the profits actually received.—Powers v. Trustees of Caledonia County Grammar School, Vt., 106 Atl. 836.

32. **Equity** — Laches. — Strictly speaking, laches implies more than mere lapse of time in asserting a right, requiring some actual or presumable change of circumstances rendering it inequitable to grant relief.—Miller v. Walser, Nev., 181 Pac. 437.

33. **Estoppel**—Prejudice.—Prejudice to adverse party is an essential element of estoppel.—Milliken v. Haner, Ky., 212 S. W. 605.

34. **Fish**—Riparian Owner.—The riparian owner on a non-tidal stream has the right to take fish from water over his own land, to the exclusion of the public.—In re Opinions of the Justices, Me., 106 Atl. 865.

35. **Frauds**—Statute of and Modification.—Where defendant by written memorandum sold bran to plaintiff for delivery at certain point, it was competent for plaintiff, suing for damages for breach, to prove an alleged oral modification relating to time of shipment, though contract was within the statute of frauds.—McDonald v. Union Hay Co., Minn., 172 N. W. 891.

36. **Homicide**—Deadly Weapon.—A stick, described as a black jack limb about two or three feet long and about as big as witness' wrist, with which defendant struck and killed deceased, was not per se a deadly weapon, and its character as such was a question of fact.—Hollman v. State, Tex., 212 S. W. 663.

37.——Self Defense.—One attacked by another with a knife, not in his own house, or on his own premises, is justified in fatally shooting his assailant only where apparently he cannot avoid his own injury by retreating.—Brown v. United States, U. S. C. C. A., 257 Fed. 46.

38. **Husband and Wife**—Separate Property.—The wife may acquire, hold, and dispose of her separate property independent of the will of her husband, and is not bound by his independent acts and conduct in relation thereto.—Sharshel v. Smith, Colo., 181 Pac. 541.

39.——Suretyship of Wife.—Where a married woman borrowed money from a bank to which she gave her note secured by a mortgage upon her own land, and it is not shown that her husband was bound for repayment of such sum, but that she considered the loan made to her and the debt as her own, she is not entitled to have the mortgage declared void as being a mere security for her husband's debt under Code 1907, § 4497.—Street v. Alexander City Bank, Ala., 82 So. 111.

40. **Injunction**—Use of One's Own.—Courts of equity will not aid one man to restrict another in the uses to which he may lawfully put his property, unless the right to such aid is clear.—Marsh v. Marsh, N. J., 106 Atl. 810.

41. **Insurance** — False Representations. — In view of Comp. Laws 1917, § 1154, subd. 3, false statements and answers of insured will avoid policy if insured knew, or should have known, that statements were false.—Chadwick v. Beneficial Life Ins. Co., Utah, 181 Pac. 448.

42.——Insurable Interest.—Assignment of life policy to assignee having no insurable interest in life of insured is void, being against public policy.—Milliken v. Haner, Ky., 212 S. W. 605.

43.——Insurable Interest.—Lessee would have an insurable interest in improvements made by it at its own expense, though lease obligated lessor, in case of partial destruction, to restore premises, since lessor in such case would be bound to repair only to the extent of restoring the premises to the condition in which they were when lease was executed and before lessee made improvements in question.—Phoenix Ins. Co. v. Shulman Co., Va., 99 S. E. 602.

44.——Invalid Award.—Where referees selected to ascertain fire loss are not as free from bias, prejudice, sympathy, and partnership as judges and jurors are presumed to be, award is invalid.—Bradbury v. Insurance Co. of State of Pennsylvania, Philadelphia, Me., 106 Atl. 862.

45.——Material Representations.—Insured's false representations affecting the moral risk, such as that he had not applied for or taken out other insurance of same kind and that he had never received indemnity for accident or illness, though not directly contributing to his accidental death, are not rendered immaterial by Laws 1907, c. 226.—Becker v. Kansas Casualty & Surety Co., Kan., 181 Pac. 549.

46. **Judgment**—Garnishment.—The question of whether a judgment should have been for the amount of a replevin bond or for the value of the property received cannot be raised on collateral attack by surety, on application by plaintiff after judgment for a writ of garnishment.—Tripplett v. Hendricks, Tex., 212 S. W. 754.

47. **Landlord and Tenant**—Amicable Possession.—Possession of tenant is presumed to be amicable, and in harmony with the title of the landlord, until the contrary is shown by clear and convincing evidence.—Holton v. Jackson, Ky., 212 S. W. 587.

48. **Libel and Slander**—Candidate for Office.—When anyone becomes a candidate for a public office, he is considered as putting his character in issue, and everyone may freely comment on his conduct and actions, but to the malicious publication of libelous matter against a candidate for public office there is no defense on the ground of privilege, and it is not a defense that the libelous charge was mistakenly and honestly made.—Ogren v. Rockford Star Printing Co., Ill., 123 N. E. 587.

49.——Language of Libel.—A libel suit being based on language or its equivalent, a complaint should put the court in possession of the libelous matter published, so as to enable court to determine whether words are actionable, and that defendant may be advised concerning exact charges he will be called upon to meet.—Evans v. McKay, Tex., 212 S. W. 630.

50. **Marriage**—Reputation.—A contract of common-law marriage may be shown as an inference of fact from cohabitation, declarations of the parties, and reputation among friends and kindred.—Hamlin v. Grogan, U. S. C. C. A., 257 Fed. 59.

51. **Master and Servant**—Assumption of Risk.—A fireman, injured by running into unlighted switch target while attempting to get on slowly moving engine, does not assume risk of injury.—Norfolk & W. Ry. Co. v. Whitehurst, Va., 99 S. E. 568.

52.——Fellow Servant.—Servant assumes risks caused by negligence of fellow servant.—Taylor v. White, Tex., 212 S. W. 656.

53.——Police Power.—Rev. Laws 1910, § 3769, requiring public service corporations to give to employes a letter stating nature of service rendered and cause of discharge, is a valid exercise of the police power of the state.—Dickinson v. Perry, Okla., 181 Pac. 594.

54. **Mines and Minerals**—Location Notice.—Location notices should be liberally construed, and in determining the sufficiency thereof the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty.—Sydnex v. Richards, Cal., 181 Pac. 394.

55. **Mortgages**—Attorney Fees.—Any indebtedness of plaintiff mortgagor to defendant for money expended by defendant for alleged attorney's fees in defending plaintiff's title could not be tacked on amount necessary to redeem from defendant's foreclosure sale.—Jordan v. Donovan, N. D., 172 N. W. 838.

56.——Deed.—An instrument in form of ordinary warranty deed, providing that "this mortgage deed" is a second mortgage, there being a first mortgage to certain parties to which mortgage deed was subject and containing no defeasance clause, was not a mortgage, but an instrument passing title to secure a debt in the amount stated as consideration of the deed.—Troup Co. v. Speer, Ga., 99 S. E. 541.

57.——Redemption.—In a court of law an agreement to allow redemption cannot, by parol, be ingrafted upon a deed absolute in terms.—Smith v. Thompson, Ala., 82 So. 101.

58. **Navigable Waters**—Riparian Rights.—A deed of land, located in a government lot bordering upon a meandered lake, described by metes and bounds, without any reference to lake, in absence of a contrary showing, conveys only land embraced within lines of description, and does not carry with it any riparian rights.—Stavanau v. Gray, Minn., 172 N. W. 885.

59. **Negligence**—Proximate Cause.—Proximity in point of time or space is not an element of proximate cause of an injury.—Nunan v. Bennett, Ky., 212 S. W. 570.

60.——Res Ipsa Loquitur.—When a thing causing injury is shown to be under defendant's management, and the accident is such as in the ordinary course of things does not happen if those in charge use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from a want of care.—Duran v. Yellow Aster Min. & Mill. Co., Cal., 181 Pac. 395.

61. **Partnership**—Chose in Action.—Where a partnership is dissolved, one partner, an assignee of the other's rights, title, and interest in partnership assets, may maintain an action against a tortfeasor for the entire damages sustained by the partnership; interest in assignable "chose in action" being intangible property.—Sullivan v. Curling, Ga., 39 S. E. 533.

62.——Division of Profits.—The mere agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners, but it is the association of two or more persons for the purpose of carrying on business together which is the distinguishing feature of a partnership.—Auditorium Co. v. Barsotti, Cal., 181 Pac. 413.

63.——Fraud and Mistake.—A party desiring to rescind a partnership settlement on ground of mistake or fraud must on discovery of the facts at once announce his purpose and adhere to it, and, if he remains silent and treats property as his own, he will be held to have waived the objection and will be conclusively bound by the agreement.—Wood v. Wood, Pa., 106 Atl. 887.

64.——Holding Out.—Billheads and letterheads of a partnership, where used so extensively and for so long a time by one who had ceased to be a member that defendant members must have known thereof, were admissible in suit involving question whether defendants held themselves out as partners with the one who had ceased to be a member.—Ennis-Hanly-Blackburn Coffee Co. v. Olin, Mo., 212 S. W. 561.

65.——Legal Entity.—A partnership is not a legal entity separate and distinct from the persons composing it.—Heinze v. Iudustrial Commission, Ill., 123 N. E. 598.

66. **Patents**—Element in Combination.—A part which is clearly made an essential element of a combination claim by the patentee must be given effect as a limitation, although in actual use of the machine it proved unimportant.—Firestone Tire & Rubber Co. v. Seiberling, U. S. C. C. A., 257 Fed. 74.

67.——Infringement.—Since infringement of a combination claim depends on defendant's using or vending an article having all the patented elements, failure to employ a certain element or its equivalent avoids infringement.—Heyl & Patterson v. M. A. Hanna Coal & Dock Co., U. S. D. C., 257 Fed. 97.

68. **Principal and Agent**—Undisclosed Principal.—Where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.—Duerr v. Sloan, Cal., 181 Pac. 407.

69. **Railroads**—Licensee.—A lumber company owes a licensee on its log train no duty with respect to the condition of its track, cars, or other instrumentalities; its sole duty being to exercise ordinary care in the operation of the train.—Kirby Lumber v. Davis, Tex., 212 S. W. 831.

70.——War Control.—Carrier corporations during period of federal control under Act Cong. Aug. 29, 1916, § 1 (U. S. Comp. St. § 1974a), and President's proclamation of December 26, 1917, and Rail Control Act March 21, 1918 (U. S. Comp. St. 1918, §§ 3115¾a-3115¾p), remain legal entities, capable of suing and being sued in the courts, and are champions of their own legal rights.—McGregor v. Great Northern Ry. Co., N. D., 172 N. W. 841.

71. **Sales**—Acceptance.—The mere acceptance by purchaser of property, after damages have accrued in consequence of nondelivery according to contract, does not waive or relinquish right of action for damages accrued at time of acceptance.—Lukens Iron & Steel Co. v. Hartmann-Greiling Co., Wis., 172 N. W. 894.

72.——Unconditional Offer.—Where it is claimed that a seller has become bound by a buyer's acceptance of his offer, it must appear that the offer was accepted unconditionally and without variance.—Saluda Wholesale & Warehouse Co. v. J. M. V. Rooney & Co., Ga., 99 S. E. 542.

73. **Taxation**—Delinquency.—The fact that property was in fact sold for delinquent taxes is jurisdictional, for, if no sale in fact occurred, the basis for subsequent proceedings would not exist.—Pace v. Wight, N. M., 181 Pac. 430.

74.——Situs.—If the proper situs for taxation of intangible personal property is in a certain district and county, it is liable for local as well as state taxation at that situs.—Rixey's Ex'rs v. Commonwealth, Va., 99 S. E. 573.

75. **Trespass**—Shade Trees.—Owner's measure of damages for destruction of a shade or ornamental tree is the difference in the market value of the premises on which the tree is growing with or without the tree, being the value of the tree because of its peculiar place and location on the premises.—McKinsey v. Guthrie, Mo., 212 S. W. 563.

76. **Trusts**—Perpetuities.—Though trust created by deed is void as a perpctuity, yet, where trustees have had adverse possession of trust property for more than 20 years, and recognized beneficiaries as such, the trust should be continued at least so long as the objects and purposes of it exist or so long as it can be executed in substantial conformity with provisions of deed now recognized and administered under supervision of the court.—Latrobe v. American Colonization Soc., Md., 106 Atl. 858.

77. **Venue**—Transitory Action.—Under Rev. Laws, c. 167, § 1, plaintiff can sue on a transitory cause of action, as one for breach of contract of employment, in any county where defendant has a usual place of business.—West v. New York, N. H. & H. R. Co., Mass., 123 N. E. 621.

78. **Wills**—Repugnancy.—A later clause of a will, when repugnant to a former provision, is considered as intended to modify or abrogate the former.—Meins v. Meins, Ill., 123 N. E. 554.

79.——Undue Influence.—Undue influence is that which destroys testator's free agency and constrains him to do what he would otherwise refuse to do.—Huff v. Woosley, Ky., 212 S. W. 597.